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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

REA EXPRESS, INC., BANKRUPT, C. ORVIS SOWERWINE,
TRUSTEE IN BANKRUPTCY, PETITIONER

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION, ET AL.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP
CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION
EMPLOYEES, PETITIONER

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

MEMORANDUM FOR THE
FEDERAL RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-868

REA EXPRESS, INC., BANKRUPT, C. ORVIS SOWERWINE,
TRUSTEE IN BANKRUPTCY, PETITIONER

v.

UNITED STATES OF AMERICA AND INTERSTATE
COMMERCE COMMISSION, ET AL.

No. 77-869

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP
CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION
EMPLOYEES, PETITIONER

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMISSION, ET AL.

*ON PETITIONS FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT*

**MEMORANDUM FOR THE
FEDERAL RESPONDENTS IN OPPOSITION**

At issue in this case is whether the Interstate Commerce Commission abused its discretion by dismissing an application for permanent motor common carrier operating authority for want of timely prosecution. The

dismissal was based on findings that the applicant (1) had made no attempt to prosecute its application for more than eight years; (2) had specifically repudiated, as unworkable and infeasible, the operational concept on which its application was predicated; and (3) was bankrupt and liquidated and in no position to provide the transportation services for which permanent authority had been sought (REA Pet. App. 58a-60a).¹ The court of appeals held that the Commission acted well within its discretionary authority in dismissing the permanent application for lack of timely prosecution (REA Pet. App. 12a-17a). The decision of the court of appeals is correct, it does not conflict with any decision of this Court or another court of appeals and does not warrant further review by this Court.

1. Petitioner REA contends that the Commission's denial of the permanent application for lack of timely prosecution under Rule 247(f) of the Commission's Rules of Practice, 49 C.F.R. 1100.247(f),² was improper because the applicant had not violated a Commission order to proceed (REA Pet. 10). As the court of appeals correctly held, however, "a finding of noncompliance with an order of the Commission is not a prerequisite to

¹As a result of the dismissal of the permanent authority application, the appurtenant temporary authority under which the applicant had been conducting express operations until its bankruptcy adjudication in November 1975 terminated as a matter of law. 49 C.F.R. 1101.1(a); REA Pet. App. 60a.

"REA Pet." refers to the petition for a writ of certiorari in No. 77-868. "BRAC Pet." refers to the petition in No. 77-869.

²Rule 247(f) provides in pertinent part: "An applicant who does not intend timely to prosecute its application shall promptly request dismissal thereof. Failure to prosecute an application under procedures ordered by the Commission will result in dismissal thereof."

dismissal of an application for failure to prosecute under Rule 247(f)" (REA Pet. App. 17a). The Commission reasonably construed its Rule 247(f) as placing an "affirmative duty" on an applicant to prosecute its application in a timely fashion or to seek dismissal, and as permitting the Commission to enforce that duty, *sua sponte*, in an appropriate case (REA Pet. App. 12a-13a, 16a-17a). As the court of appeals noted, a contrary construction would render the first section of the rule meaningless and would deprive the Commission of a means to correct abuses of its temporary authority procedure (REA Pet. App. 17a). The deference accorded by the court of appeals to the Commission's reasonable interpretation of its own procedural rule was proper, and there is no reason for this Court to disturb that determination. *Udall v. Tallman*, 380 U.S. 1, 16-17; *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 413-414.

Petitioners further contend (REA Pet. 8-9; BRAC Pet. 6-9) that the Commission's dismissal of the permanent application was not warranted under the facts of the present case.³ The court of appeals correctly found, however, that the record provided "ample justification" and substantial evidence to support the Commission's action (REA Pet. App. 13a-16a, 23a). Further review of those essentially factual issues is not warranted.

2. There is no merit in petitioner REA's claim (REA Pet. 10-11) that the procedure followed by the Commission provided petitioner with inadequate notice of the issues to be resolved in the administrative proceeding. The petition filed by the American Trucking Associations, Inc., nearly nine months prior to the start of the oral

³Although REA briefly adverts to a supposed conflict among the circuits by reference to cases involving dismissals of court cases (REA Pet. 9), it is evident that its claim of error in the Commission's dismissal is simply that on the particular facts of this case it was unwarranted.

hearing, specifically placed REA on notice that dismissal of the permanent application under Rule 247(f) for lack of timely prosecution and revocation of the corresponding temporary authority were the dispositive issues to be resolved by the Commission (REA Pet. App. 8a).

3. Petitioner BRAC contends that the Commission failed to accord sufficient weight to the interest of former REA employees in obtaining employment with a possible purchaser of REA's operating rights (BRAC Pet. 9-10). The Commission specifically considered these contentions, raised for the first time by BRAC in its petition for reconsideration before the Commission,⁴ and found that they did not warrant a different result (REA Pet. App. 71a). No issue of employee interests is presented under the National Transportation Policy where, as here, REA's operations had ceased as a result of bankruptcy and liquidation and all BRAC employees had been terminated prior to the commencement of the proceedings before the Commission (REA Pet. App. 24a, n. 16). Compare 45 U.S.C. 565(b)(1) and (4).

⁴BRAC chose not to participate at the prior stages of the proceeding (REA Pet. App. 69a-70a).

CONCLUSION

The petitions for a writ of certiorari should be denied.
Respectfully submitted.

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